No. 13,893.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLAIR LAVERNE WHITE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE

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REPLY BRIEF OF APPELLEE.

I.

Statement of Jurisdiction.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on September 4, 1952, under Section 462 of Title 50, App., United States Code, for refusing to submit to induction into the armed forces of the United States. [I,[1] pp. 2-3.]

On September 29, 1952, the appellant was arraigned, entered a plea of not guilty, and the case was set for trial on March 11, 1953.

On March 11, 1953, trial was begun in the United States District Court for the Southern District of California by the Honorable William C. Mathes, without a jury, and on March 30, 1953, the appellant was found guilty as charged in the indictment. [I, p. 23.]

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[1]"I" refers to Transcript of Record, Vol. I.

On April 6, 1953, the appellant was sentenced to imprisonment for a period of four years and judgment was also entered. [I, pp. 24-28.] Appellant appeals from this judgment. [I, p. 29.]

The District Court had jurisdiction of this cause of action under Section 462 of Title 50, App., United States Code, and Section 3231, Title 18, United States Code.

This court has jurisdiction under Section 1291 of Title 18, United States Code.

II.

Statutes Involved.

The indictment in this case was brought under Section 462 of Title 50, App., United States Code.

The indictment charges a violation of Section 462 of Title 50, App., United States Code, which provides, in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [Section 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said section] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . ."

III.

Statement of the Case.

The indictment charges as follows:

"Indictment

[U. S. C., Title 50, App., Sec. 462—Selective Service Act, 1948]

The Grand Jury charges:

Defendant CLAIR LAVERNE WHITE, a male person within the class made subject to selective service under the Selective Service Act of 1948, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 82, said board being then and there duly created and acting under the Selective Service System established by said act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class I-A-C and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on July 18, 1952, in Los Angeles County, California, in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do." [I, pp. 2-3.]

On September 29, 1952, appellant appeared for arraignment and plea, represented by Charles E. Borning, Esq., before the Honorable William C. Mathes, United States District Judge, and entered a plea of not guilty to the offense charged in the indictment.

On March 11, 1953, the case was called for trial before the Honorable William C. Mathes, without a jury, and Harold Shire, Esq., represented the defendant. The appellant was found guilty as charged in the indictment on March 30, 1953. [I, p. 23.]

On April 6, 1953, the appellant was sentenced to imprisonment for a period of four years in a penitentiary. [I, p. 24.]

Appellant assigns as error the judgment of conviction on the following grounds:

A. The District Court erred in failing to grant the Motion for Judgment of Acquittal duly made at the close of all the evidence. (App. Spec. of Error 1, App. Br. p. 9.)[2]

B. The District Court erred in convicting the appellant and entering a judgment of guilt against him. (App. Spec. of Error 2, App. Br. p. 9.)

C. The District Court erred in denying the motion for new trial. (App. Spec. of Error 3, App. Br. p. 10.)

D. The District Court committed reversible error upon the trial when it excluded the secret investigative F.B.I. report and denied appellant the right to have it used at the trial to determine whether or not the hearing officer made a fair and adequate summary of the adverse evidence appearing in the report as required by due process of law, the act and the regulations. (App. Spec. of Error 4, App. Br. p. 4.)

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[2]"App. Spec. of Error" refers to "Appellant's Specification of Errors"; "App. Br." refers to "Appellant's Brief."

IV.

Statement of the Facts.

On July 14, 1949, Clair Laverne White registered under the Selective Service System with Local Board No. 82, North Hollywood, California. He was eighteen years of age at the time, having been born on July 13, 1931. He gave his occupation as "press operator" and indicated he was employed at the North Hollywood Tool and Die Co. [F. 1.][3]

On November 9, 1950, the appellant filed with Local Board No. 82, SSS Form 100, classification questionnaire. [F. 5-14.] In Series VI he stated that he was a minister of religion, but that he did not regularly serve as a minister of the Jehovah's Witnesses. [F. 7.] He stated that he was a punch press operator and had worked 1½ years at the trade and expected to continue indefinitely at the trade. [F. 8.] He stated that he worked an average of 48 hours per week and was paid at the rate of $1.20 per hour. [F. 9.] The appellant signed Series XIV of that questionnaire and thus, informed Local Board No. 82 that he claimed exemption from military service by reason of conscientious objection to participation in war. He also requested further information and forms. [F. 11.]

SSS Form 150, Special Form for Conscientious Objector, was furnished to the appellant and he completed this form and filed it with Local Board No. 82 on November

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[3]Numbers preceded by "F." appearing herein within brackets refer to pages of Appellant's draft board file, Government's Exhibit 1, a file of photostatic copies of papers filed in the cover sheet of Appellant's draft board file. At the bottom of each page thereof appears an encircled handwritten number which identified the pages in the draft board file.

20, 1950. The appellant claimed to be conscientiously opposed to participation in war in any form, by reason of his religious training and belief. [F. 15-20.]

On January 15, 1951, the appellant was classified I-A-O by Local Board No. 82 and was mailed SSS Form 110, Notice of Classification, on January 16, 1951. [F. 12.]

On January 18, 1951, the appellant filed Notice of Appeal from his classification and requested a personal appearance before the board. [F. 23.] On January 29, 1951, the appellant appeared before the Local Board. The Local Board reviewed the case and retained the appellant in Class I-A-O, indicating that their decision was influenced by the fact that the appellant was then employed by a company which was manufacturing parts for airplanes. [F. 12, 22, 24.] Appellant was notified of these facts on January 30, 1951. [F. 12.]

On March 19, 1951, the appellant's file was forwarded to the Appeal Board. [F. 12.] On April 11, 1951, the Appeal Board reviewed the file and determined that the appellant was not entitled to a classification in either a class lower than IV-E or Class IV-E, and the file was forwarded to the Department of Justice for an advisory opinion. [F. 12, 38-41.]

On March 6, 1952, a hearing was held by the Hearing Officer of the Department of Justice pursuant to notice, and the appellant appeared at the hearing. The Hearing Officer recommended that the appellant be retained in Class I-A-O. [F. 42-43.]

On April 11, 1952, the Attorney General, Department of Justice, recommended that the appellant be retained in Class I-A-O. [F. 44.]

On May 19, 1952, the Appeal Board classified the appellant in Class I-A-O and notified the appellant of this action. [F. 12.]

On May 29, 1952, the appellant filed a Notice of Appeal to the President. [F. 12, 45.] The appellant was advised in writing on June 3, 1952, that his file was not forwarded to the President because the Appeal Board vote was unanimous. [F. 46.]

On June 24, the appellant was ordered to report for induction on July 7, 1952 [F. 47.] On July 11, 1952, the Local Board was notified of appellant's failure to report for induction on July 7, 1952. [F. 49.]

The appellant reported to his Local Board and was presented with an Order to Report for induction on July 18, 1952. [F. 12.]

On July 18, 1952, the appellant reported for induction as previously ordered, but refused to submit to induction into the armed forces of the United States. [F. 12, 51-52.]

V.

ARGUMENT.

POINT ONE.

The Classification of the Appellant by the Appeal Board in Class I-A-O Was a Valid Classification.

The classification of registrants by Local Boards and Appeal Boards are provided by 50 U. S. Code, App., Section 460, which provides in pertinent part:

> ". . .
>
> (b) The President is authorized—
>
> (3) to create and establish . . . civilian local boards, civilian appeal boards, . . . Such local boards . . . shall, under the rules and regulations prescribed by the President, have the power . . . to hear and determine . . . all questions or claims, with respect to inclusion or exemption or deferment from, training and service under this title (said sections), of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. . . . The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President. . . ."

The Appeal Board has jurisdiction, thus, to hear appeals and classify anew.

32 C. F. R., Section 1626.26—Decision of Appeal Board—provides:

> "(a) The appeal board shall classify the registrant, giving consideration to the various classes *in the same manner in which the local board gives consideration thereto when it classifies a registrant,* except that an

appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.

(b) Such classification of the registrant shall be *final,* except where an appeal to the President is taken: Provided, That this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of Part 1625 of this chapter." (Emphasis added.)

The classifications of the local boards and later the appeal boards made in conformity with the regulations are *final* even though erroneous. The question of jurisdiction arises only if there is no basis in fact for the classification.

Estep v. United States, 327 U. S. 114;
Tyrrell v. United States, 200 F. 2d 8 (9th Cir.).

Appellant contends that there is no contradictory evidence in the file disputing appellant's statements as to his conscientious objections or veracity, and that, therefore, the action of the Board in classifying in Class I-A-O was arbitrary, capricious and without basis in fact. A reading of the appellant's Selective Service file [Govt. Ex. 1] would indicate the contrary.

Selective Service Regulations, Section 1622.11 (32 C. F. R. 1622.11), provides:

"Sec. 1622.11—Class I-A-O—*Conscientious Objector Available for non-combatant military service only.*

(a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of re-

ligious training and belief, to be conscientiously opposed to combatant training and service in the armed forces.

(b) Section 6(j) of Title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

'Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal code.' "

Selective Service Regulations, Section 1622.14 (32 C. R. F. 1622.14), provides:

"Sec. 1622.14—Class I-O—*Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National health, safety, or interest.*

(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to both combatant and non-combatant training and service in the armed forces.

(b) Section 6(j) of Title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

'Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a purely personal moral code.' "

These sections of the Selective Service Regulations define in broad terms the qualifications necessary for classifi-

cation as a conscientious objector in classification I-A-O and I-O. The application of these descriptions to particular registrants is a duty imposed upon the Local Boards and later the Appeal Boards. The boards are left to determine how and when a registrant claiming exemption from military service by reason of conscientious objection was to be qualified. The exercise of that discretion, even though it may have been erroneous, is final in the absence of arbitrary or capricious conduct or the part of the Board so classifying a registrant.

Estep v. United States, supra.

To aid the Board in its determination of the conscientious objector claims of registrants, the Selective Service System uses SSS Form 150, Special Form for Conscientious Objection in addition to SSS Form 100, Classification Questionnaire. The questions and answers given thereto by a registrant are the basis of a classification by a Board within the broad terms of Selective Service Regulations, Sections 1622.11 and 1622.14. The burden is upon the registrant to maintain and prove his claim within these categories.

United States v. Schoebel, 201 F. 2d 31;
Davis v. United States, 203 F. 2d 853.

This burden was not met by the appellant in the present case as evidenced by the classification given him by the Board.

A reading of the record in the instant case presents no circumstances which disclose any bias, prejudice, arbitrary, capricious or unreasonable conduct on the part of the Board in the classification of the appellant. The trial court, therefore, properly denied appellant's motion for judgement of acquittal.

POINT TWO.

The Trial Court Committed No Error When It Refused to Receive Into Evidence the F.B.I. Report and Excluded It From Inspection and Use by the Appellant in the Trial of This Case.

At the trial, the court made an *in camera* examination of the investigative reports of the Federal Bureau of Investigation, marked Defendant's Exhibits A, B and C. The court held that the reports were not sufficiently relevant to outweigh the public interest in the preservation of the confidential character of executive documents pursuant to the Attorney General's regulations. [II, pp. 47-48.] It is within the power of the trial court to exclude irrelevant, immaterial and incompetent evidence. Furthermore, procedural irregularities or omissions which do not result in prejudice to the defendant (appellant) are to be disregarded.

Martin v. United States, 190 F. 2d 775 (4th Cir.);
Tyrrell v. United States, supra;
Atkins v. United States, 204 F. 2d 269.

United States v. Nugent, 346 U. S. 1, appears to be applicable in this case. The procedure followed by the Department of Justice in this case was in accord with the *Nugent* case which held that the conscientious objector was not entitled to inspect the investigator's reports (pp. 5-6), and that the Department satisfies its duties by permitting the registrant to present his views and relevant evidence, and to supply him with a fair résumé of any adverse evidence in the investigator's report (p. 6), if he requests it. Here, since there was no unfavorable evidence [II, p. 41, line 4], this duty has been satisfied.

VI.

Conclusion.

The appellant was duly and validly classified by the Appeal Board.

No error was committed by the trial court by not placing the investigative reports of the Federal Bureau of Investigation into evidence.

There was no error by the District Court in denying the motion for acquittal of the defendant.

There was no error by the District Court in entering a judgment of guilt against him.

There was no error by the District Court in denying the motion for a new trial.

There was no error of law in the rulings of the trial court, and therefore, the conviction should be affirmed.

Respectfully submitted,

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